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ESSAYS

STUDENTS' RIGHTS AND HOW THEY ARE WRONGED*

*Nadine Strossen***

Defending and enhancing the rights of students and young people has always been a major priority for the American Civil Liberties Union.¹ One reason is that the rights of our nation's youth are always especially embattled²—not surprisingly, since they are not yet eligible to vote and, therefore, lack political power.

We also champion the rights of young people because they are our country's future voters and leaders. At some point, my generation will be passing the torch of liberty to them. And we want to know that they will carry it strongly and proudly,

* This essay is based on a speech Nadine Strossen delivered to the student body at Germantown Academy in Fort Washington, Pennsylvania, on October 6, 1997.

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1. See, e.g., JANET R. PRICE ET AL., *RIGHTS OF STUDENTS: BASIC ACLU GUIDE TO A STUDENT'S RIGHTS* (3rd ed. 1988); The ACLU Website, *Students' Rights* (visited Feb. 12, 1998) <<http://www.aclu.org/issues/student/hmes.html>>.

2. See generally Onora O'Neill, *Children's Rights and Children's Lives*, in *CHILDREN, RIGHTS AND THE LAW* 24 (Philip Alton et al. eds., 1992); Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 *FAM. L.Q.* 343 (1972); Patricia M. Wald, *Making Sense Out of the Rights of Youth*, 4 *HUM. RTS.* 13 (1974).

standing up for not only their own rights, but also the rights of everyone else in our society. We believe that if other people do not respect the rights of young people, then young people are less likely to grow up respecting the rights of other people.

The Supreme Court made this point in a landmark case that upheld the free expression rights of public school students, *Tinker v. Des Moines School District*,³ decided in 1969. I am proud that this historic decision was an ACLU case. We represented Mary Beth Tinker, a junior high school student, who was suspended from school for wearing a black armband to protest the Vietnam War.⁴ The Supreme Court declared that students do not "shed their constitutional rights to freedom of . . . expression at the schoolhouse gate."⁵ The Court also reaffirmed the crucial, long-term importance of respecting students' rights in the following words:

That [schools] are educating the young for citizenship is reason for scrupulous protection of [their] Constitutional freedoms . . . , if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.⁶

Unfortunately, *Tinker* was in many ways a high-water mark for students' rights, and we have seen some sad back-sliding in Supreme Court decisions about students' rights since then.⁷

3. 393 U.S. 503 (1969).

4. *See id.* at 504.

5. *Id.* at 506.

6. *Id.* at 507.

7. *See, e.g.,* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665 (1995) (holding that a school's policy to drug test athletes does not violate the students' Fourth and Fourteenth Amendment rights); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that a principal did not violate student First Amendment rights by "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as [his] actions [were] reasonably related to legitimate pedagogical concerns"); *id.* at 273-74. (stating that the *Tinker* standard for "determining when a school may punish student expression" is not the same as the standard "for determining when a school may refuse to lend its name and resources to the dissemination of student expression"); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that the school district acted permissibly in imposing sanctions on a student who gave "an offensively lewd and indecent speech" at a school assembly, that the district's actions did not violate the student's First Amendment rights, and that school officials were not prevented from determining that "vulgar speech and lewd conduct" undermined the educational purpose of the school).

That is part of a larger pattern. The Court that issued the *Tinker* ruling, under the leadership of Chief Justice Earl Warren, was the most protective of constitutional rights that we have ever seen.⁸ The Warren Court extended protection to many groups in our society that previously had only second-class status in terms of their constitutional rights because, like students, they were relatively powerless in the political process: for example, racial minorities,⁹ religious minorities,¹⁰ women,¹¹ immigrants,¹² political radicals and dissenters,¹³ people accused of crime,¹⁴ and prisoners.¹⁵

Unfortunately, since the Warren era, for the last couple of decades, the Supreme Court has tended to look less favorably on constitutional rights and civil liberties.¹⁶ There have been cutbacks and assaults on all rights.¹⁷ Especially embattled, as always, are the rights of groups that are relatively disempowered, and, unfortunately, that includes young people.¹⁸

Lately, the ACLU has been working against a barrage of measures that undermine the rights of minors. I will cite just some examples:

8. See generally *THE WARREN COURT: A RETROSPECTIVE* (Bernard Schwartz ed., 1996).

9. See generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Julius L. Chambers, *Race and Equality, The Still Unfinished Business of the Warren Court*, in *THE WARREN COURT*, *supra* note 8; Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 *IOWA L. REV.* 1059 (1974).

10. See, e.g., *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

11. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1983).

12. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971).

13. See, e.g., *Sweezy v. Wyman*, 354 U.S. 234 (1957).

14. See, e.g., *Spano v. New York*, 360 U.S. 315 (1959).

15. See, e.g., *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

16. See Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 *HASTINGS L.J.* 805, 867 (1990); Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 *HASTINGS L.J.* 285 (1991); see generally DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983).

17. See generally Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 *W. VA. L. REV.* 769 (1997).

18. See *id.* at 798-804.

■ Censorship laws that specifically target media and expression that are particularly popular with young people, including rap and rock music,¹⁹ videogames,²⁰ TV,²¹ cable,²² and cyberspace;²³

■ Measures that block young people's access to important information, e.g., by restricting their access to the Internet in public and school libraries;²⁴

■ Teen curfew laws, which effectively put all minors under house arrest;²⁵

■ Laws that treat juvenile offenders the same as adults, including by imprisoning them with adults who have been convicted of brutal, violent crimes,²⁶ and

19. See generally Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25 (1993/1994); The ACLU Website, *Popular Music Under Siege* (visited Feb. 15, 1998) <<http://www.aclu.org/library/pbr3.html>>; see also *The Social Impact of Music Violence, Hearing Before the Senate Subcomm. on Oversight of Gov't Management Restructuring and the District of Columbia*, 105th Cong. (1997) (statement of C. Delores Tucker, Chair, National Political Congress of Black Women), available in 1997 WL 14153110.

20. See generally Matthew Hamilton, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181 (1995).

21. See Communications Decency Act of 1996, S. 505, 110 Stat. 56 (1996) (requiring manufacturers to include a "V-chip" in future television sets); see, e.g., *Text of the State of the Union Address*, WASH. POST, Jan. 24, 1996, at A13; The ACLU Website, *Violence Chip* (visited Feb. 15, 1998) <<http://www.aclu.org/library/aavchip.html>>; The ACLU Website, *ACLU Expresses Concerns on TV Rating Scheme; Says "Voluntary" System is Government-Backed Censorship* (visited Feb. 15, 1998) <<http://www.aclu.org/news/n022996b.html>>.

22. See Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949; *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

23. See, e.g., George Cole, *Censorship in Cyberspace*, THE FIN. TIMES, Mar. 21, 1996; see generally Dawn L. Johnson, *It's 1996: Do You Know Where Your Cyber Kids Are? Captive Audiences and Content Regulation on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 51 (1996); Ernest J. Walker, Note, *The Communications Decency Act: A Cyber-Gag to First Amendment Rights On the Internet*, 75 U. DET. MERCY L. REV. 187 (1997).

24. See, e.g., Lisa J. Huriash, *City Library to Offer Access to the Internet—Children Will Have Viewing Restrictions*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 25, 1998, available in 1998 WL 3256361; Jeremy Redmon, *Library Patrons Want Net Block, Survey Shows*, WASH. TIMES, Dec. 12, 1997; The ACLU Website, *Virginia County Restricts Net Access in Libraries* (visited Apr. 27, 1998) <<http://www.aclu.org/news/w102497a.html>>.

25. See *Curfews and Common Sense*, N.Y. TIMES, June 11, 1996; Michael Janofsky, *Teen-Agers in Washington Face New Curfew*, WASH. POST, Oct. 30, 1996.

26. See The Violent Youth Predator Act of 1996, H.R. 3656, 104th Cong. § 1 (1996); see also The ACLU Website, *Congress Considers Jailing Children with Adults*

■ Various repressive measures in the schools, including mass surveillance and search techniques—such as urinalysis drug testing,²⁷ drug-sniffing dogs,²⁸ searches of lockers and backpacks,²⁹ and even strip searches³⁰—and, as another example, severe restrictions on any kind of student expression, ranging from message t-shirts or other clothing, to artworks, to school newspapers.³¹

I would like to quote a statement about why it is so important for young people to be aware of, and concerned about, constitutional rights. It was made by someone else, but I agree with every word:

One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaging from political participation. It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass.³²

These are very timely words, especially in light of all the recent evidence that young people are not particularly interested or involved in the political process—indeed, that many are alienated from it.³³ Thus, these words could have been spoken

(visited Mar. 18, 1998) <<http://www.alcu.org/action/juvenile.html>>. One should note that imprisoning juvenile offenders with violent adults violates international human rights law. See *International Covenant on Civil and Political Rights*, in HUMAN RIGHTS: COMPILATION OF INTERNATIONAL INSTRUMENTS 18-39 (1988).

The ACLU has recently initiated a lawsuit on behalf of the parents of a young man who committed suicide in a Texas adult prison, where he was repeatedly raped and attacked. See The ACLU Website, Press Release (visited Mar. 18, 1998) <<http://www.aclu.org/news/n110597b.html>>.

27. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1989).

28. See *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (holding that a dog's sniffing of a student's person was a "search" within the purview of the Fourth Amendment).

29. See *id.* (holding that dog's sniffing of a student's locker in hallway did not constitute a search); see also *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

30. See, e.g., Joan Biskupic, *Justices Let Stand Strip Search of Second-Graders; Lower Court Had Ruled That School's Response to Theft Did Not Violate Girls' Rights*, WASH. POST, Nov. 11, 1997; Philip Franchine, *Judge Backs Strip-Search of Student in Orland Park*, CHI. SUN-TIMES, Mar. 25, 1992.

31. See Peter Baker, *Censorship Ruling Has Student Newspapers Walking a Fine Line*, WASH. POST, Jan. 31, 1989; N.H. *Student's Artwork Censored, Other Teen-Agers Withdraw Their Own Displays in Protest*, B. GLOBE, May 31, 1996;

32. *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 972 (5th Cir. 1972).

33. See *Bored and Lazy Freshmen*, S.F. CHRON., Jan. 13, 1998, at A20; *College*

by any current leader. In fact, though, these words are as timeless as they are timely. They were uttered by the respected Judge Irving Goldberg more than a generation ago at the height of the student activism movement.³⁴

Judge Goldberg's words are in many ways a credo for the ACLU. I would like to explain why these words are important, giving some basic information about our work on behalf of civil liberties generally. I would also like to provide a context for my discussion of our work on behalf of students' and young people's rights. As Founding Father James Madison recognized, the Constitution itself is only a piece of parchment, and hence a "parchment barrier[]"³⁵ against government violations of individual rights, since none of its provisions is self-executing. The Constitution's words that articulate individual rights are worth only the paper they are written on unless government officials actually enforce them on behalf of actual individuals.

In fact, for too much of our history, constitutional rights were mere paper promises, which were honored only in the breach. That is exactly why the ACLU was founded in 1920—to actually breathe life into these words, by providing legal assistance and other forms of support for victims of rights violations.³⁶

Think about the dreadful state of civil liberties at that time. We had racial apartheid by law in many parts of our country.³⁷ Women did not even have the right to vote, let alone any other legal rights.³⁸ Police broke into houses without search warrants, looking for people with unpopular political views, who were thrown into prison or deported, often without any legal process.³⁹ During World War I, 15,000 people were arrested and imprisoned merely for peacefully criticizing the United States war effort.⁴⁰ At least one minister was impris-

Freshmen Have the Blahs, Survey Indicates; Academic, Civic Apathy Reach Record Levels, WASH. POST, Jan. 12, 1998, A1.

34. See *Shanley*, 462 F.2d at 972.

35. THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961).

36. See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 46-47(1990); ACLU Briefing Paper #1, *Guardian of Liberty: American Civil Liberties Union* (visited Feb. 11, 1998) <<http://aclu.org/library/pbp1.html>>.

37. See ACLU Briefing Paper #1, *supra* note 36.

38. WALKER, *supra* note 36, at 166-67.

39. See ACLU Briefing Paper #1, *supra* note 36.

40. See *id.*

oned merely for saying the War was "unChristian."⁴¹ Another citizen was jailed for reading the First Amendment aloud in public.⁴² Now *that's* a subversive and dangerous act!

In order to respond to these terrible civil liberties violations, the ACLU was founded with the goal of defending all fundamental freedoms for all individuals, no matter who they were, and no matter what their political or religious beliefs were.⁴³ Our organization's goal has always been to defend the rights of everyone, including young people and students, because history demonstrates that all rights are indivisible: if the government is ceded the power to violate one right of one person or group, then no right is safe for any person or group.⁴⁴

Since the ACLU's founding in 1920, we have seen enormous progress in securing civil liberties for all people, including young people and others who are relatively powerless politically. I am proud of the central role that the ACLU has played in this positive development. As stated by historian Samuel Walker in his 1990 book, *In Defense of American Liberties: A History of the ACLU*, "[t]he history of the American Civil Liberties Union is the story of America in this century."⁴⁵ Professor Walker explained:

When the ACLU was founded in 1920, the promises of the Bill of Rights had little practical meaning for ordinary people. Today, there is a substantial body of law in all the major areas of civil liberties: freedom of speech and press, separation of church and state, free exercise of religion, due process of law, equal protection, and privacy. The growth of civil liberties since World War I represents one of the most important long-term developments in modern American history, a revolution in the law and public attitudes toward

41. See WALKER, *supra* note 36, at 156.

42. See *id.* at 54.

43. See, for example, WALKER, *supra* note 36, at 323-40, for a discussion of the ACLU's defense of the right of American Nazi Frank Collin to demonstrate in Skokie, Illinois, in 1977; see also Ken Chowder, *The ACLU Defends Everybody*, SMITHSONIAN, Jan. 1998, at 86.

44. See generally Nadine Strossen, *Civil Liberties*, 4 GEO. MASON U. CIV. RTS. L.J. 253 (1994); Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present and Future*, 29 HARV.C.R.-C.L. L. REV. 143 (1994).

45. WALKER, *supra* note 36, at 3.

individual liberty. Some have called it the "rights revolution" This change forms one of the great themes in twentieth-century American history [I]t equals in significance the commonly cited themes of industrialization, urbanization, and American involvement in the world economy.

The ACLU can legitimately claim much of the credit—or be assigned the blame, if you prefer—for the growth of modern constitutional law. Consult a standard constitutional law textbook and note the cases deemed important enough to be listed in the table of contents—the proverbial "landmark" cases. The ACLU was involved in over 80 percent of them; in several critical cases, the Supreme Court's opinion was drawn directly from the ACLU brief.⁴⁶

I recite this tribute to the improved state of civil liberties in this country, and the ACLU's role in bringing that about, not so that we should be content with what has already been achieved and rest on our laurels. To the contrary, I do so for the opposite reason: to inspire and encourage all who care about individual rights to continue to fight for them. Despite our progress, we still have a long way to go to ensure that the fundamental freedoms of all individuals are fully and equally respected.

In saying that more work needs to be done to secure civil liberties, my benchmark is the simple but powerful statement of ideals in our nation's founding document, the Declaration of Independence: "All men are created equal and endowed . . . with inalienable rights."⁴⁷

Obviously, we were nowhere near living up to these words at the time they were written. They were aspirational, not descriptive, in nature. And, while we have made significant progress toward achieving that aspiration, we have not yet fully achieved it.

In continuing our progress toward fulfilling our Founders' ideal, individual people—including people who are relatively unpowerful and unpopular—can make a tremendous difference, not only for themselves, but also for others. This was the theme

46. *Id.* at 3-4.

47. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of a wonderful book by Professor Peter Irons, a political scientist who also has a law degree. In law school, of course, most of the reading material consists of Supreme Court decisions, which discuss legal issues, and contain almost no information about the individuals who started the lawsuits that end up in the high court, except their names (and sometimes not even that). In light of his personal beliefs and experience, Peter became intensely curious about the real people who gave not only their names, but also so much of their time and energy, to the cases that he was studying in law school.

As a young man, Peter had turned his draft card in to the government, consistent with his philosophical and political beliefs, and consequently had to endure a prosecution and trial.⁴⁸ He therefore knew, from personal experience, how burdensome it is to go through a court fight for your rights. Accordingly, he particularly admired the individuals who were so staunch and tenacious in asserting their rights, that they pursued them all the way to the Supreme Court. He interviewed an impressive sampling of such individuals, whose cases led to landmark rulings of constitutional law. Those interviews became the centerpiece of his book, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*.⁴⁹ As Peter wrote in his *Preface*, these sixteen individuals, whose cases led to historic constitutional law rulings, "include women and men. They are black, white, Hispanic, and Asian. They are gay and straight. They are carpenters, bartenders, doctors, and lawyers. They live in all sections of our country. They profess many religions and none. They are united only by their diversity."⁵⁰ And also, of course, they are guided by the courage of their convictions.⁵¹

The sixteen heroic individuals featured in this inspiring book include some young people—for example, Mary Beth Tinker,

48. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* vii (1988).

49. *Id.*

50. *Id.* at xi.

51. See *id.* at 11 ("There are faces behind the 'masks of the law,' voices behind the pages of the Court's opinions, people who speak to us in this book. Each face is distinctive, each voice is unique, each life is different. Backgrounds vary, motivations differ. But this chorus of sixteen harmonizes a common refrain: courage and conviction.").

who was only thirteen when she was dismissed from school for wearing a black armband to protest the Vietnam War, thus launching the leading students' rights case that bears her name.⁵²

To this day, the ACLU continues to represent brave young individuals who stand up for their own rights and, thereby, help to establish principles and precedents that enhance the rights of others.

I would like to quote one of the ACLU's young clients in one of our recent, important victories in the Supreme Court, *Lee v. Weisman*.⁵³ Significantly, this case involved the rights of young people at school. Our client, Deborah Weisman, was only thirteen years old when the case started. Thanks to Deborah and her family, the Supreme Court had the opportunity to issue a significant ruling that protects religious liberty for everyone against government-sponsored prayer at official, school-sponsored events, and in that case, graduation ceremonies. The Court reaffirmed that such government-supported prayer—in contrast with prayer by individuals or families or religious communities—violates the “separation of church and state” that is mandated by the First Amendment's Establishment Clause.⁵⁴

I have enormous admiration for all persons who stand up for any right, who usually do not make themselves popular with their peers by doing so. That is inevitable, since by asserting individual rights, they are necessarily challenging decisions or actions that are supported by the majority of the members of their particular communities. Indeed, this core fact prompts a question I am frequently asked about the ACLU's cases involving separation of church and state, or other civil liberties: “What about the rights of the majority?” For example, why should Deborah Weisman's school not include a prayer as part of the official graduation ceremony, if a majority of the students and their parents would favor it?⁵⁵

52. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

53. 505 U.S. 577 (1992).

54. See U.S. CONST. amend I.

55. Circuits are split as to whether “voluntary, student-initiated” graduation prayer is constitutional. Compare *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th

To be sure, the majority of any community or governmental unit does have significant rights or powers, but they are not unlimited under our system of government.⁵⁶ The framers of our Constitution deliberately declined to design a purely majoritarian form of government. They recognized that even elected representatives, reflecting the will of the majority of their constituents, could ride roughshod over the rights and interests of some individuals, particularly those that belong to unpopular or unpowerful minority groups. Therefore, in order to check the "tyranny of the majority"⁵⁷ against which James Madison warned, our Constitution recognizes that some rights are so fundamental that no majority may take them away from any minority, no matter how small, disempowered, or unpopular it might be. The Bill of Rights was added to the original Constitution to underscore and entrench this principle.

So, under our governmental system, individual rights are respected in theory. But, as I have already discussed, where individual rights are concerned, there is often a wide gap between theory and reality. Consider the litany of blatant violations that I recited above, at the time of the ACLU's founding, almost 130 years after the Bill of Rights was ratified.⁵⁸ It is one thing for our system to respect individual rights in theory. It is another thing to actually stand up and demand that they be respected. That's where we—and our brave clients—get into trouble! Our clients too often become pariahs at best, and targets of persecution and harassment at worst. That is certainly

Cir. 1994), *vacated and remanded on other grounds*, 515 U.S. 1154 (1995) (holding that student-initiated graduation prayers are unconstitutional), *with Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) (holding that graduation prayers do not violate any of the tests set forth by the Supreme Court and are thus constitutional); *see also* Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional?*, 9 BYU L. REV. 291 (1995).

56. *See West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (explaining that "[t]he purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").

57. ROBERT J. MORGAN, *JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS* 199 (1988) (stating that rule by a majority is "the most tyrannical and intolerable of all").

58. The Bill of Rights was ratified in 1791. *See* C. HERMAN PRITCHETT, *CONSTITUTIONAL CIVIL LIBERTIES* 3 (1984). The ACLU was founded in 1920. *See* WALKER, *supra* note 36, at 47.

true in our cases involving "separation of church and state."⁵⁹ As is so often true when religion is concerned, feelings run very deep.

So I am particularly grateful when people are willing to put their personal lives on the line—sometimes quite literally—in order to stand up for our religious liberty. And I especially admire someone like Deborah Weisman, who did it at such an early stage in her life, when she was thirteen years old. Here are Deborah's own words, from a letter posted on the ACLU's Website:

Hi, I'm Deborah Weisman. My involvement with the issue of church/state separation began in 1986 when my older sister, Merith, was graduating from junior high I'll never forget how uncomfortable I felt when a Baptist minister led us in a prayer at the ceremony. I had always felt that religion is important and has its place, but I didn't think a public school was that place. My parents sent the school a letter that was never answered.

Three years later, just before my own eighth grade graduation, my parents called the school to bring up the prayer issue again. A teacher told them, "We got you a rabbi." They thought we objected to the minister just because we're Jewish! But a rabbi wouldn't have made it any better: Prayer in public school was what we objected to. The school board told us that graduation prayer was a tradition. If we had a problem with the practice, they said, we could sue. And that's just what we did. The ACLU of Rhode Island assigned us a lawyer, who asked the federal court to order the school board to stop having graduation prayers. The court ruled in our favor, the school board appealed, we won again, and the school board appealed again—this time to the U.S. Supreme Court. The Supreme Court hears less than 5 percent of the cases brought before it, so we were surprised when the Justices agreed to hear our case.

Almost three years after my eighth grade graduation and nine days after my high school commencement . . . , we won: When a public school sponsors a prayer of any faith, the Supreme Court said, it violates the First Amendment.

59. See Nadine Strossen, *Lisa Herdahl and Religious Liberty*, 46 CLEV. ST. L. REV. (Forthcoming 1998); see also Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427 (1997).

Throughout the years of waiting for a ruling, we were harassed by hate mail and even death threats, and the media attention often bothered me. But . . . at no time did I regret having taken our case to court. What amazes me is that it only took me and my family to make a difference.⁶⁰

As I said earlier, our victory in Deborah's case, *Lee v. Weisman*, is, unfortunately, not as typical as I would like. To be sure, we're still winning major victories, including the Supreme Court's landmark 1997 ruling that secured free speech on the Internet, *Reno v. ACLU*.⁶¹ This was a major civil liberties milestone for minors and adults alike. The Supreme Court held that government may not restrict online communications in cyberspace for the sake of shielding minors, when the price is that adults also are denied access to those communications.⁶² Moreover, the Court noted that young people have free speech rights of their own.⁶³

Notwithstanding significant victories such as *Lee v. Weisman* and *Reno v. ACLU*, though, we are losing cases too, including cases for young people. Let me tell you about one such case since it reflects an all-too-typical negative attitude toward young people's rights on the part of the majority of current and recent Supreme Court Justices. The case is *Vernonia School District v. Acton*,⁶⁴ in which the Court held that a junior high school could impose mass, random urinalysis drug tests on all of its students who wanted to participate in any athletic activity, even if there was absolutely no reason to suspect that a particular student had actually used drugs.

Our client in this case, James Acton, was only twelve years old when the case began. Here is his explanation of why he objected to the suspicionless drug testing program, from his letter on the ACLU's Website:

60. The ACLU Website, Letter from Deborah Weisman (visited Feb. 22, 1998) <<http://www.aclu.org/court/clients/dweis.html>>.

61. 117 S. Ct 2329 (1997).

62. See *id.* at 2346.

63. See *id.* at 2356-57; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

64. 515 U.S. 646 (1995).

Hi. My name is James Acton and I [challenged] my school[s] drug testing policy because I believe in the right guaranteed to me by the Fourth Amendment of the United States Constitution. It says we have the right "to be secure in our persons, houses, papers, and effects against unreasonable searches."

This right prevents our houses from being searched against our will without a search warrant. Just as the government should not be allowed to search our house without a warrant, finding things we may wish to be private, the government should not be allowed to search our bodies either. This would say that our bodies are less private than our homes.

Making kids take a drug test without any proof that they are taking drugs is just like searching a house without a warrant or proof of something wrong.

[My] school . . . had no reason to think I was taking drugs. I wanted to play sports and I was one of the smartest kids in the class. I never even got a referral to the principal's office. I thought that was proof enough that I wasn't taking drugs. So I refused to take the test . . .

It may seem a little difficult to believe that a 12-year-old thought of this all by himself. But its [sic] not too difficult to understand the right to privacy. I think everybody should be taught that they have that right, before it is taken away.⁶⁵

I agree with James, and so did a number of judges who ruled on his case, including three Supreme Court Justices.⁶⁶ Unfortunately, the latter three were dissenting from the majority's ruling, which held that public junior and senior high school students could be subjected to mass or random suspicionless urinalysis drug tests. Perhaps, as has happened throughout our history, a position that is initially expressed in a dissenting opinion may ultimately be adopted by a future majority as the law of the land. Probably the most famous instance also in-

65. The ACLU Website, Letter from James Acton (visited Feb. 22, 1998) <<http://www.aclu.org/court/clients/acton.html>>.

66. Acton lost at the district court level. *See Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354 (D. Or. 1992). The Ninth Circuit, however, reversed. *See Acton v. Vernonia Sch. Dist.*, 23 F.3d 1514 (9th Cir. 1994).

A majority of the Supreme Court ruled against Acton. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). Justice O'Connor, however, wrote a lengthy dissent, in which Justices Stevens and Souter joined. *See id.* at 666.

volving the rights of young people in school was *Brown v. Board of Education*,⁶⁷ the 1954 ruling that overturned the Court's 1896 decision in *Plessy v. Ferguson*.⁶⁸

During the oral argument in the Supreme Court in the *Acton* case, at the very outset of the argument by the ACLU attorney who was representing James Acton, Justice Antonin Scalia expressed his view that students in public schools have very limited rights.⁶⁹ He referred to precedents in which the Court had held that students have no constitutional protection against corporal punishment⁷⁰—not even the procedural right to receive some kind of advance notice or opportunity to respond to the charges at issue.⁷¹ Ironically, the Court has ruled that while the Eighth Amendment protects convicted felons against “cruel and unusual punishments” while in prison,⁷² in contrast,

67. 347 U.S. 483 (1954).

68. 163 U.S. 537 (1896).

69. See United States Supreme Court Official Transcript at *43, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (No. 94-590), available in 1995 WL 353412 (Justice Scalia noting that one “cannot assume that children in [public schools] . . . have all of the rights that an emancipated adult has”); *id.* at *52 (Justice Scalia asserting, “But [in this case] you’re dealing with children. You’re not dealing with adults who have a totally different set of rights.”).

70. See *id.* at *52 (Justice Scalia explaining that “[t]here may be parents who don’t like corporal punishment in schools, . . . but . . . it existed at common law, and [the Court does not] use the Eighth Amendment to say you can’t have it”).

71. See *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that the Eighth Amendment prohibition against cruel and unusual punishment does not apply to discipline in public schools, and that the due process clause does not require notice and a hearing before corporal punishment is imposed).

In contrast, the European Court of Human Rights has ruled that corporal punishment in public and private schools is subject to the constraints of Article 3 of the European Convention on Human Rights, which prohibits “inhuman or degrading treatment or punishment.” FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 478 (2nd ed. 1996). As a result, the United Kingdom has prohibited corporal punishment in state schools. See *id.*; see also Frances Gibb, *Changing the Law Would Put Britain on Trial*, *THE TIMES*, Oct. 30, 1996; Sandra Maler, *Another Blow to British Tradition—Caning to be Banned*, *REUTERS*, Aug. 14, 1987.

72. See *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (explaining that “[a] prison official’s ‘deliberate indifference’ to a substantial risk of harm to an inmate violates the Eighth Amendment”); *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that a prisoner’s Eighth Amendment claim could be based on harm to health resulting from his exposure to environmental tobacco smoke); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that use of excessive force against a prisoner may constitute cruel and unusual punishment even though the prisoner does not suffer serious injury); *Wilson v. Seiter*, 501 U.S. 294, 303-04 (1991) (holding that prisoners claiming that conditions of confinement constituted cruel and unusual punishment were required to show “de-

public school students who have not even been charged with disciplinary infractions—let alone convicted of crimes—have no such protection, under either the Eighth Amendment or other constitutional provisions.⁷³

Significantly, Justice Scalia authored the Court's decision in the *Acton* case, and throughout it he consistently stressed that young people in our nation's public schools are second-class citizens in terms of their constitutional rights. When referring to junior and senior high school students, he repeatedly and consistently used the term "children"⁷⁴ rather than "minors" or "young people," thus infantilizing the teenagers—some on the verge of entering college, the military, and full-time jobs—who could be subjected to mass urinalysis drug-testing programs under the Court's rationale. Even more significantly, he contrasted public school students with "free adults,"⁷⁵ thus highlighting the view that students are not free.

Also noteworthy is the fact that the ringing dissent in *Acton* was written by Justice Sandra Day O'Connor,⁷⁶ who had been appointed to the Court by President Ronald Reagan and could hardly be accused of being a flaming liberal! She pointed out in her dissent that, as a result of the majority's ruling, completely innocent students in our nation's public schools apparently have fewer rights to be protected from the indignity and intrusiveness of suspicionless urinalysis drug tests than do convicted felons serving time in our nation's prisons.⁷⁷

Notwithstanding disappointing rulings and rationales such as those in the Supreme Court's *Acton* decision, we are still win-

liberate indifference" on the part of prison officials).

73. See *Ingraham*, 430 U.S. at 664.

74. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654-56, 658, 662, 665 & n.4 (1995).

75. See *id.* at 655.

76. See *id.* at 666.

77. See *id.* at 680-81 (O'Connor, J., dissenting) ("The instant case . . . asks whether the Fourth Amendment . . . is so lenient that students may be deprived of [its] only remaining and basic, categorical protection: its strong preference for an individual suspicion requirement, with its accompanying antipathy toward personally intrusive, blatant searches of mostly innocent people. *It is not all that clear that people in prison lack this categorical protection . . .*") (emphasis added). Justice Scalia, writing for the majority, responded that "[t]here is no basis for the dissent's insinuation that . . . [the majority] equat[es] the Fourth Amendment's status of schoolchildren and prisoners. . . ." See *id.* at 664 n.3.

ning many civil liberties victories on behalf of students and young people, even in the drug-testing area. That is because the Supreme Court's interpretations of the United States Constitution are not the only avenue for protecting individual rights, including students' rights. State court judges may interpret their state constitutions as affording more protection for individual rights than the United States Supreme Court has interpreted the United States Constitution to afford—even when the pertinent state constitutional provision closely tracks, or indeed is identical to, the corresponding federal constitutional provision.⁷⁸ Thus, while the majority of United States Supreme Court Justices rejected the arguments of James Acton and the ACLU that his school's drug-testing program constituted an impermissible search and seizure under the United States Constitution, a state court judge would be free to rule that such programs constitute impermissible searches and seizures under the state constitution.⁷⁹

In addition to state constitutions, students' and young people's rights may also find sources of enhanced protection in state statutes, state educational regulations, and policies of individual school districts. For example, even after the Supreme Court substantially cut back on students' free speech rights in

78. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (noting that states have the option of providing greater protections to their citizens through their own constitutions, even where the text of the state constitutional provision is identical to the federal constitution); *People v. Barber*, 46 N.E.2d 329, 331 (N.Y. 1943) (noting that, when reviewing questions involving fundamental rights protected under the state constitution, state appellate courts are not bound by the decisions of the Supreme Court of the United States that interpret similar questions under the federal constitution); see also Gayl Shaw, Westerman, *The Promise of State Constitutionalism: Can it be Fulfilled in Sheff v. O'Neill?*, 23 HASTINGS CONST. L.Q. 351, 354 (1996) ("Today, no commentator and certainly no judge . . . would deny that state courts have the power, and indeed the duty, to independently interpret their own constitutions."); see generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Hans A. Linde, *On Reconstituting "Republican Government": William J. Brennan, Jr., Lecture Series in State Constitutional Law*, 19 OKLA. CITY U. L. REV. 193 (1994).

79. See *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (analyzing the case under both the federal and state constitutions and holding that school's policy of requiring students to submit urine samples for drug testing violated students' right to be free from unreasonable search and seizure, their rights to due process and their legitimate expectation of privacy and personal security).

its 1986 ruling in *Hazelwood School District v. Kuhlmeier*,⁸⁰ many students continue to enjoy the more robust free speech rights that the Supreme Court had recognized in the *Tinker* case, thanks to these other sources of protection.

The ACLU recently successfully defended the rights of two Massachusetts high school students, Jeff and Jonathan Pyle, to wear t-shirts with messages that some teachers and administrators deemed offensive. This students' rights victory was grounded on a Massachusetts statute⁸¹ that ensured the same strong protection for student expression that the Supreme Court had assured in *Tinker*: that student expression could be restricted only if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."⁸²

We also continue to win significant lower court victories for young people under the United States Constitution. Recently, for example, both the federal district court in Washington, D.C., and the United States Court of Appeals for the Ninth Circuit have sustained our constitutional challenges to teen curfew laws in Washington, D.C., and San Diego, California.⁸³

And in many instances we are able to help young people exercise their rights without having to rely on any judges or courts, merely by talking to and negotiating with their school

80. 484 U.S. 260 (1988).

81. See MASS. GEN. LAWS ANN. ch. 71, § 82 (West 1991).

82. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

The district court upheld the portion of the school's dress code that restricted vulgar expression by students. See *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994). On appeal, the United States Court of Appeals for the First Circuit certified a question of state law to the Supreme Judicial Court of Massachusetts. See *Pyle v. South Hadley Sch. Comm.*, 55 F.3d 20, 22 (1st Cir. 1995). In answering the First Circuit's certified question, the Massachusetts court held that high school students in public schools have the freedom under statute in Massachusetts (G.L. c.71 § 82) to engage in expression that may reasonably be considered vulgar, but does not cause disruption or disorder. See *Pyle v. South Hadley Sch. Comm.*, 667 N.E.2d 869, 871 (Mass. 1996).

The messages deemed offensive were printed on t-shirts and included: "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and "Coed Naked Band: Do it To the Rhythm." See *Pyle v. South Hadley Sch. Dist.*, 861 F. Supp. 157, 158 (D. Mass. 1994).

83. See *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); *Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C. 1996).

officials. For example, we recently persuaded school officials in Bellevue, Washington to retract their punitive actions against a student who had posted a parody of his school's newspaper—which was clearly labeled as such—on his personal Website.⁸⁴

But none of the potential tools or strategies for protecting the rights of students and young people can have any positive effect unless there are actually young individuals who are willing to invoke them, to assert their rights, and to pursue their possible remedies by seeking out the ACLU or other legal assistance. We could not have won *Tinker*, *Weisman*, or any of the other victories that redound to the benefit of all young people—and, indeed, all individuals—without the brave young clients who had “the courage of their convictions,” and spoke up against violations of their freedoms.

To underscore the importance of speaking up for your rights—and, hence, for everyone's rights—I would like to quote my favorite ACLU t-shirt, which was designed by the ACLU of Southern California. Thanks to TV shows and films about crime and police, we all know that “you have the right to remain silent.” The message on this t-shirt, though, reminds us that we have another right, equally precious, yet not as widely known or exercised; it says, “You have the right NOT to remain silent.”

84. See *Case Involving Free Speech and the Internet is Settled*, N.Y. TIMES, Dec. 24, 1995, at 16; The ACLU Website, *ACLU-W Backs Student Punished for Internet Parody* (visited Feb. 22, 1998) <<http://www.aclu.org/community/washing/wanews2.html>>.

